(2)

No. 03-1067

IN THE

Supreme Court of the United States

MEDICAL INSTRUMENTATION AND DIAGNOSTICS CORPORATION,

Petitioner,

v.

ELEKTA AB, ELEKTA INSTRUMENT AB, ELEKTA INSTRUMENTS, INC. AND ELEKTA ONCOLOGY SYSTEMS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOHN F. SWEENEY
HARRY C. MARCUS
MORGAN & FINNEGAN, LLP
345 Park Avenue
22nd Floor
New York, NY 10154-0053
(212) 415-8525

Of Counsel

THERESA M. GILLIS
(*Counsel of Record*)
PAUL E. TORCHIA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Respondents

QUESTIONS PRESENTED

Should the Court grant the petition where neither question presented in the petition was raised in either court below and neither question is addressed in the Federal Circuit's opinion with respect to which review is being sought?

Does the Federal Circuit's decision, which does not address any issues relating to equivalents under 35 U.S.C. § 112 ¶ 6 or under the doctrine of equivalents, present a vehicle for review of Federal Circuit jurisprudence concerning equivalents?

Does the requirement of 35 U.S.C. § 112 ¶ 6 that a means-plus-function element of a patent claim "shall be construed" to cover corresponding structures "described in the specification" apply to all means-plus-function elements or only to those at the "point of novelty" of the invention?

PARTIES

The Petitioner is Medical Instrumentation and Diagnostics Corporation. Respondent makes no representation as to petitioner's corporate affiliations.

The Respondents are Elekta AB, Elekta Instrument AB, Elekta Instruments, Inc. and Elekta Oncology Systems, Inc. No parent corporation or any publicly-held company owns ten percent or more of respondents' stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. THIS CASE PRESENTS NO ISSUES CONCERNING EQUIVALENTS 8

II. THIS CASE PRESENTS NO ISSUES WORTHY OF REVIEW CONCERNING THE INTERPRETATION OF 35 U.S.C. § 112 10

A. There Is No Conflict Concerning Interpretation Of 35 U.S.C. § 112 10

B. Because The Issue Was Not Preserved In The Courts Below, This Case Is Not An Appropriate Vehicle For Review Of The Federal Circuit's Interpretation Of 35 U.S.C. § 112 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Altiris, Inc. v. Symantec Corp.,
318 F.3d 1363 (Fed. Cir. 2003) 10, 15

Arizona v. California, 373 U.S. 546 (1963).....13

Aro Mfg. Co. v. Convertible Top Replacement Co.,
365 U.S. 336 (1961) 13

B. Braun Med., Inc. v. Abbott Labs.,
124 F.3d 1419 (Fed. Cir. 1997) 6, 7, 14, 15

Budde v. Harley-Davidson, Inc.,
250 F.3d 1369 (Fed. Cir. 2001) 15

Continental Paper Bag Co. v. Eastern Paper Bag Co.,
210 U.S. 405 (1908) 12

Epcon Gas Sys. Inc. v. Bauer Compressors, Inc.,
279 F.3d 1022 (Fed. Cir. 2002) 15

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.,
535 U.S. 722 (2002) 7, 9

General Electric Co. v. Wabash Appliance Corp.,
304 U.S. 364 (1938) 11, 12

Generation II Orthotics v. Medical Tech., Inc.,
263 F.3d 1356 (Fed. Cir. 2001) 10, 15

George. E. Warren Corp. v. United States,
341 F.3d 1348 (Fed. Cir. 2003) 14

Golight, Inc. v. Wal-Mart Stores, 2004 U.S. App
LEXIS 775 (Fed. Cir. Jan. 20, 2004).....10, 15

Graver Tank & Mfg. Co. v. Linde Air Products Co.,
339 U.S. 605 (1950) 2, 4, 8

Greenberg v. Ethicon Endo-Surgery,
91 F.3d 1580 (Fed. Cir. 1996) 10

TABLE OF AUTHORITIES (con't)

Page

Halliburton Oil Well Cementing Co. v. Walker, 329 U.S. 1 (1946) 12

Intellectual Prop. Dev., Inc. v. UA-Columbia Cablevision of Westchester, Inc., 336 F.3d 1308 (Fed. Cir. 2003) 10, 15

Johnston v. IVAC Corp., 885 F.2d 1574 (Fed. Cir. 1989) 11

Kahn v. GMC, 135 F.3d 1472 (Fed. Cir. 1998) 10, 15

Mansell v. Mansell, 490 U.S. 581 (1989) 12

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) 2

Medtronic, Inc. v. Advanced Cardiovascular Sys., 248 F.3d 1303 (Fed. Cir. 2001) 15

Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) 2

Nelson v. Adams, USA, Inc., 529 U.S. 460 (2000) 15

Northrop Grumman Corp. v. Intel Corp., 325 F.3d 1346 (Fed. Cir. 2003) 10, 15

Owen v. Owen, 500 U.S. 305 (1991) 12

Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931 (Fed. Cir. 1987) 11

Russello v. United States, 464 U.S. 16 (1983) 13

Smith v. United States, 507 U.S. 197 (1993) 13

Stewart-Warner Corp. v. City of Pontiac, 767 F.2d 1563 (Fed. Cir. 1985) 11

Unidynamics Corp. v. Automatic Products Int'l, 157 F.3d 1311 (Fed. Cir. 1998) 10, 15

United States v. Lovasco, 431 U.S. 783 (1977) 15

Utah Med. Products, Inc. v. Graphic Controls Corp., 350 F.3d 1376 (Fed. Cir. 2003) 10, 15

TABLE OF AUTHORITIES (con't)

Page

Valmont Industries, Inc. v. Reinke Mfg. Co.,
983 F.2d 1039 (Fed. Cir. 1993) 10, 11

Warner-Jenkinson Co. v. Hilton Davis Chem. Co.,
520 U.S. 17 (1997) 3, 4, 7, 8, 9, 11

Statutes and Legislative Materials

35 U.S.C. § 112 ¶ 6 ..... *passim*

35 U.S.C. § 112 ¶ 1 2

Miscellaneous

Robert Chisum, Chisum on Patents (2003) 2

Rudolph P. Hofman, Jr. & Edward P. Heller,
The Rosetta Stone for the Doctrines of Means-Plus-Function Patent Claims,
23 Rutgers Computer & Tech. L.J. 227 (1997).....12, 13

The two questions presented by the petition were not raised below, were not addressed by the Federal Circuit in its opinion and are not relevant to the facts and evidence adduced by the courts below. Indeed, at best, the petition raises only an issue that was conceded below and a legal question about which there is *no* disagreement—not even disagreement between the majority and dissenter below. In short, the petition raises no legal issues of general importance beyond the facts of this particular patent case or that otherwise would merit the Court's plenary review.

The first issue in the petition relates to the Federal Circuit's jurisprudence concerning "equivalents" in patents. In the patent context, "equivalents" refer to structures that are insubstantially different from structures literally set forth in the patent. A product can infringe a patent either literally or because it is insubstantially different from (*i.e.*, "equivalent" to) the patented invention. In the Federal Circuit, petitioner argued only literal infringement and conceded that the structure in the allegedly infringing products was not equivalent to the structures described in the patents. Because petitioner raised no issues concerning equivalents in the Federal Circuit, the Federal Circuit did not address equivalents in the opinion for which petitioner seeks review. Therefore, the petition is not an appropriate vehicle for reviewing the Federal Circuit jurisprudence concerning equivalents.

The second issue raised in the petition centers around the interpretation of 35 U.S.C. § 112—namely, does § 112 ¶ 6 apply to all elements of a patent claim or only to a subset deemed to be important because they are at the "point of novelty." According to petitioner, § 112 ¶ 6 applies only to elements of patent claims that are at the "point of novelty." That interpretation of § 112 has no support in the jurisprudence of the Federal Circuit or any other court and is inconsistent with the language of § 112 and its legislative history. Moreover, petitioner never advanced this

interpretation of § 112 in the courts below. Therefore, the petition is also an inappropriate vehicle for interpreting § 112.

STATEMENT OF THE CASE

A patent consists of a "specification" and "claims." The "specification" is the text contained in the body of the patent that describes the invention and teaches one how to make and use it. *See* 35 U.S.C. § 112 ¶ 1; 3 Robert Chisum, Chisum on Patents § 7.01, 10 (2003). The "claims" define the invention and put the public on notice of the limits of the patent. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510 (1917) ("The scope of every patent is limited to the invention described in the claims contained in it . . . These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains."). Claims consist of a series of subparts or "elements," each of which describes a necessary piece of the invention.

A determination of infringement involves a two step process. First, the court construes the claims, providing meaning to claim terms in the context of the invention. 5A Chisum on Patents § 18.03[2][a], 104-105. Claim construction is a pure question of law. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 387 (1996). Second, the fact finder compares the construed claims to the accused products. *Id.* at 384.

To prove "literal" infringement of a patent claim, the patent owner must show that the accused device contains each and every element of that claim exactly as specified in the claims. 5A Chisum on Patents § 18.03[4][a], 333-334. If a device does not literally infringe a claim, it may still infringe that claim under the "doctrine of equivalents." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 608-09 (1950). To prove infringement under the

doctrine of equivalents, the patent owner must show that an "equivalent" structure exists in the accused products for any claim element not literally present. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997). An accused structure is "equivalent" to a claim element if the two are interchangeable or insubstantially different. *Id.* at 24-25.

Most claims concerning a machine or an apparatus explicitly set out the components of the machine or apparatus in the claim. For example, a patentee claiming a table could claim the table's support structure by reciting "legs, a pedestal, or trestles" in the claim. Section 112 of Title 35 permits a patentee to define a component of an apparatus purely in terms of its function. *Warner Jenkinson*, 520 U.S. at 27. By way of example, the support structure of a table could be claimed as follows: "means for supporting the tabletop." Elements of patent claims set forth in this format are known as "means-plus-function" elements.

Construction of means-plus-function elements is governed by 35 U.S.C. § 112 ¶ 6, which provides:

> *An element* in a claim for a combination may be *expressed as a means* or step *for performing a specified function* without the recital of structure, material, or acts in support thereof, and such claim *shall be construed to cover the corresponding structure*, material, or acts *described in the specification* and equivalents thereof.

35 U.S.C. § 112 ¶ 6 (emphasis added). Applying this "described-in-the-specification" rule of claim construction contained in § 112 ¶ 6 to the foregoing example of a table, the "corresponding structures" would be the specific table support structures described in the specification—not all possible table support structures.

A means-plus-function element is literally infringed by a product that includes the "corresponding structure" described

in the specification or "equivalents" of the described structure. "Equivalents" in the context of § 112 ¶ 6 narrow the literal language of the means-plus-function element.

> Section 112, ¶ 6 now expressly allows so-called "means" claims, with the proviso that application of the broad literal language of *such claims must be limited to only those means that are "equivalent" to the actual means shown in the patent specification.* This is an application of the doctrine of equivalents in a restrictive role, narrowing the application of broad literal claim elements.

Warner-Jenkinson, 520 U.S. at 28 (emphasis added). Like other claims, a claim containing a means-plus-function element may also be infringed under the doctrine of equivalents. *Warner-Jenkinson*, 520 U.S. at 21; *Graver Tank*, 339 U.S. at 607-08.

The two patents at issue in this case relate to a system used by doctors to plan medical treatments. The system acquires x-ray-like images from diverse medical scanners, such as CT scanners, converts the images to a standard digital format and then compares them. (Pet. App. 5a-6a).

The patents use the "means-plus-function" claim format permitted in § 112 ¶ 6. Specifically, one element of the claims of the patent recites "means for converting said plurality of images into a selected format." (Pet. App. 7a).

The specifications of the patents at issue here describe a system for performing this "converting function" consisting of two pieces of hardware, namely a computer video processor ("CVP") and a framegrabber. These two described devices can convert images in different analog formats to a standard digital format. (Pet. App. 8a, 12a).

In the courts below, petitioner contended that the patents not only described this framegrabber/CVP system, but also described software for converting images in different digital

formats to a standard digital format, so-called "converting software." (Pet. App. 15a-23a). Based on that contention, petitioner argued that the allegedly infringing products *literally* infringed the patents. Petitioner made no arguments concerning infringement by equivalents under either § 112 ¶ 6 or under the doctrine of equivalents.

The Federal Circuit rejected petitioner's contention that the specification described "converting software" because there was no evidence that anything in the specification put one skilled in the art or the public on notice that software was intended to be a structure corresponding to the converting function. (Pet. App. 17a, 20a, 21a). As the Federal Circuit observed, "[o]bviously, the specification itself does not disclose any software routine for digital-to-digital conversion, as [petitioner's] expert even admitted." (Pet. App. 27a). Petitioner's own expert "never pointed to any disclosure of structure for digital-to-digital conversion in the specification." (Pet. App. 15a). Because the patents failed to describe "converting software" in the specification, the Federal Circuit ruled that "converting software" did not satisfy the described-in-the-specification claim construction rule of § 112 ¶ 6.

The Federal Circuit contrasted the evidence in this case with that of other cases in which there was evidence that one skilled in the art would find a structure described in the specification and concluded:

> There is no comparable evidence in this case to indicate that a person skilled in the art would actually understand from the specification that software for digital-to-digital conversion was structure that corresponded to the means for converting.

(Pet. App. 24a). The Federal Circuit emphasized that the requirement that a structure be described in the specification derives from § 112 itself.

> It is important to determine whether one of skill in the art would understand the specification itself to disclose the structure, not simply whether that person would be capable of implementing that structure . . . . Indeed, the requirement of looking to the disclosure to find the corresponding structure comes from section 112, paragraph 6 itself. It is not proper to look to the knowledge of one skilled in the art apart from and unconnected to the disclosure of the patent.

(Pet. App. 15a). According to the Federal Circuit's interpretation of § 112 ¶ 6:

> There must be something in the disclosure to indicate to the public that the patentee intends for a particular structure to correspond to a claimed function.

(Pet. App. 26a). As explained by the Federal Circuit, the described-in-the-specification rule of § 112 ¶ 6 is necessary to ensure that the metes and bounds of the patent are clear.

> In order for the claims to serve their proper function of providing the public clear notice of the scope of the patentee's property rights, we cannot allow a patentee to claim in functional terms essentially unbounded by any reference to what one of skill in the art would understand from the public record.

(Pet. App. 29a).

> The public should not be required to guess as to the structure for which the patentee enjoys the right to exclude.

(Pet. App. 30a).

Petitioner sought rehearing in the Federal Circuit. In its petition for rehearing, petitioner criticized the Federal Circuit's requirement, articulated in *B. Braun Med., Inc. v.*

Abbott Labs., 124 F.3d 1419 (Fed. Cir. 1997), that the "described-in-the-specification" rule of § 112 ¶ 6 could only be satisfied if the described structure is clearly disclosed as corresponding structure. The court in *Braun* explained that "this duty to link or associate structure to function is the *quid pro quo* for the convenience of employing § 112 ¶ 6. Our holding in this regard is also supported by our precedent stating that claims drafted in means-plus-function format are subject to the definiteness requirement of the patent law." *Id.* at 1424. Petitioner's criticism of the *Braun* case was first raised on the request for rehearing. Indeed, during oral argument to the panel, petitioner conceded that § 112 ¶ 6 requires that there be a "close connection" between a disclosed structure and the function[1] as required by *Braun*. Petitioner simply argued that the described-in-the-specification rule of § 112 ¶ 6 had been met by the facts of the present case.

REASONS FOR DENYING THE WRIT

The first question presented by the petition—whether Federal Circuit precedent conflicts with the Court's decisions in *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997), and *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002)—was not raised or argued below. Those decisions relate to issues of infringement by "equivalents." Neither decision was even cited by petitioner in the courts below. Indeed, petitioner did not even address the issue of infringement by equivalents under § 112 ¶ 6 or under the doctrine of equivalents in the courts below. Rather, in the courts below petitioner conceded that the allegedly infringing products contained no structure that was equivalent to the CVP and framegrabber disclosed in the patent, arguing instead only literal

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[1] An audio cassette is the only record of the argument to the Federal Circuit. Respondents will lodge the cassette with the Court upon request.

infringement. (Pet. App. 29a). The issue of equivalents was not discussed in and had no bearing on the Federal Circuit decision for which petitioner seeks review.

The second question presented—whether the "described-in-the-specification" rule of § 112 ¶ 6 extends only to a subset of means-plus-function claim elements (specifically only to those claim elements that are important because they are at the "point of novelty")—was likewise not at issue below, but was first advocated in the petition. In addition, that interpretation of § 112 ¶ 6 has no support among any of the Federal Circuit judges. Moreover, it is contrary to both the plain language and the legislative history of § 112 ¶ 6.

The decision of the Federal Circuit thus does not raise issues meriting plenary review by the Court.

I. THIS CASE PRESENTS NO ISSUES CONCERNING EQUIVALENTS

The first question posed by petitioner in its petition for *certiorari* relates to "equivalents." Petitioner contends that there is inconsistency and confusion among the Federal Circuit's decisions relating to equivalents in the context of § 112 ¶ 6 claims.

However, petitioner does not connect its lengthy discourse concerning equivalents with the Federal Circuit's decision below. The reason is straightforward: equivalents was not an issue before the Federal Circuit. In this case, petitioner never contended that software is equivalent to the framegrabber and CVP under either § 112 ¶ 6 or the doctrine of equivalents or offered any evidence of equivalence.[2]

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[2] Equivalents present an issue of fact and must be proven. *See Graver Tank*, 339 U.S. at 609-10 ("A finding of equivalence is a determination of fact."). *See also Warner-Jenkinson*, 520 U.S. at 38. Presumably, petitioner made the strategic decision not to make any contention of equivalents because the framegrabber and CVP are pieces of hardware

Rather, petitioner conceded that the allegedly infringing products do not contain "equivalents" of the structures literally described in the patent (*i.e.*, the framegrabber and the CVP). As the Federal Circuit observed:

> Because [petitioner] has conceded that the accused devices do not contain these structures [*i.e.*, a framegrabber or CVP] *or their equivalents*, we reverse the judgment of infringement.

(Pet. App. 29a) (emphasis added). Given petitioner's concession of nonequivalence, the Federal Circuit's decision contains no further discussion of the issue.

The petition attempts to create the illusion of a conflict between Federal Circuit precedent and the jurisprudence of the Court by discussing the Court's recent *Festo* and *Warner-Jenkinson* cases at length. However, these cases were not discussed, indeed were never even cited, in either petitioner's original brief on appeal or its petition for rehearing.

Because issues concerning equivalents were neither preserved for appeal nor developed for review, this case does not present an appropriate vehicle for review of Federal Circuit jurisprudence concerning equivalents.

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that together convert the analog output of scanners into a digital format, while software is very different from hardware and cannot be used to convert the analog output of scanners to a digital format.

II. THIS CASE PRESENTS NO ISSUES WORTHY OF REVIEW CONCERNING THE INTERPRETATION OF 35 U.S.C. § 112

A. There Is No Conflict Concerning Interpretation Of 35 U.S.C. § 112.

Section 112 ¶ 6 requires that a means-plus-function element ". . . shall be construed to cover the corresponding structure . . . described in the specification." Petitioner's suggestion that this described-in-the-specification rule of §112 ¶ 6 applies only to means-plus-function elements at the "point of novelty," rather than to all means-plus-function elements, has no support.

Petitioner has cited no case in the fifty years of jurisprudence since enactment of § 112 ¶ 6 that supports petitioner's contention that only some elements must satisfy the described-in-the-specification rule of § 112 ¶ 6. The Federal Circuit, without exception, has applied the described-in-the-specification rule to *all* means-plus-function elements.[3] Even the dissent in this case did not dispute the

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[3] *See Golight, Inc. v. Wal-Mart Stores*, 2004 U.S. App. LEXIS 775 at *17 (Fed. Cir. Jan. 20, 2004) (Prost, Archer, Schall) (citing the Federal Circuit's opinion in the present case with approval); *Utah Med. Products, Inc. v. Graphic Controls Corp.*, 350 F.3d 1376, 1384 (Fed. Cir. 2003) (Rader, Mayer, Michel); *Intellectual Prop. Dev., Inc. v. UA-Columbia Cablevision of Westchester, Inc.*, 336 F.3d 1308, 1320 (Fed. Cir. 2003) (Schall, Dyk, Gajarsa); *Northrop Grumman Corp. v. Intel Corp.*, 325 F.3d 1346, 1352 (Fed. Cir. 2003) (Bryson, Friedman, Mayer); *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003) (Michel, Linn, Lourie); *Generation II Orthotics v. Medical Tech., Inc.*, 263 F.3d 1356, 1367 (Fed. Cir. 2001) (Linn, Dyk, Newman); *Unidynamics Corp. v. Automatic Products Int'l*, 157 F.3d 1311, 1319 (Fed. Cir. 1998) (Rich, Michel, Schall); *Kahn v. GMC*, 135 F.3d 1472, 1476 (Fed. Cir. 1998) (Gajarsa, Rader, Newman); *Greenberg v. Ethicon Endo-Surgery*, 91 F.3d 1580, 1582 (Fed. Cir. 1996) (Bryson, Michel, Nies) ("Congress permitted the use of purely functional language in claims, but it limited the breadth of such claim language by restricting its scope to the structure disclosed in the specification and equivalents thereof."); *Valmont Industries, Inc. v.*

correctness of the Federal Circuit's interpretation of § 112 ¶ 6. (Pet. App. 36a). Instead, the dissent objected only to the application of the described-in-the-specification rule to the particular facts of this case. (Pet. App. 37a).

Moreover, the Federal Circuit's interpretation of § 112 ¶ 6 as requiring that all means-plus-function elements satisfy the described-in-the-specification rule is consistent with the Court's longstanding and repeated admonition that:

> Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. . . . The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not." The claims "measure the invention."

General Electric Co. v. Wabash Appliance Corp., 304 U.S. 364, 369 (1938) (footnotes omitted). *See also Warner-Jenkinson*, 520 U.S. at 29. (noting the "the definitional and

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Reinke Mfg. Co., 983 F.2d 1039, 1042 (Fed. Cir. 1993) (Rader, Friedman, Michel) ("The applicant must describe in the patent specification some structure which performs the specified function"); *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1580 (Fed. Cir. 1989) (Nies, Baldwin, Bissel) ("112 ¶6 operates to *cut back* on the types of *means* which could literally satisfy the claim language") (emphasis in original); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931, 934 (Fed. Cir. 1987) (en banc); *Stewart-Warner Corp. v. City of Pontiac*, 767 F.2d 1563, 1571 (Fed. Cir. 1985) (Newman, Miller, Smith).

public-notice functions of the statutory claiming requirement").

Nor would the Federal Circuit have any reason to question this longstanding precedent as both the plain language of § 112 ¶ 6 and its legislative history preclude limiting the described-in-the-specification rule of § 112 ¶ 6 to elements at the "point of novelty." By its terms, § 112 ¶ 6 is not limited to elements at the so-called "point of novelty." Nothing in the language of § 112 suggests treating "important" means-plus-function elements relating to the "point of novelty" differently from less important ones, as advocated by petitioner. Pet. at 12. *Cf. Owen v. Owen*, 500 U.S. 305, 312-13 (1991) (rejecting notion that two categories of exemption should be treated differently where text of statute contained no justification for differentiation). The plain language of § 112 ¶ 6 thus forecloses petitioner's argument. *See Mansell v. Mansell*, 490 U.S. 581, 592 (1989).

Nor does the legislative history of § 112 ¶ 6 support petitioner's contention that means-plus-function claim elements at the "point of novelty" should be differentiated from other means-plus-function elements. Prior to enactment of § 112 ¶ 6, claim elements which recited a function without reciting structure were the subject of varying interpretations or even invalidation. *See, e.g., General Electric Co.*, 304 U.S. at 369; *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 8 (1946); *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 419-420 (1908).

In an early draft, § 112 ¶ 6 applied only with respect to means-plus-function elements that related to the "essence of the novelty of any claim." Pet. at 14. That language limiting the scope of § 112 ¶ 6 was eliminated in the statute as enacted. As explained by the commentator on whom petitioner relies, the drafters intended that "[n]o longer would a court need to consider whether the element was 'at the point of novelty'." Rudolph P. Hofman, Jr. & Edward P.

Heller, *The Rosetta Stone for the Doctrines of Means-Plus-Function Patent Claims*, 23 Rutgers Computer & Tech. L. J. 227, 279-80 (1997).

Moreover, the Court has repeatedly held that it is improper to resurrect limitations abandoned by Congress prior to enactment of a statute. *See, e.g., Smith v. United States*, 507 U.S. 197, 202-203 n.4 (1993) (rejecting a statutory interpretation that would have resurrected a differentiation between classes of residents that had existed in a draft of the legislation, but had been dropped in the final legislation); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Arizona v. California*, 373 U.S. 546, 580-81 (1963) ("[I]n an earlier version the bill did limit the Secretary's contract power . . . . But that restriction, which preserved the law of prior appropriation, did not survive. It was stricken from the bill . . . . [W]e are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms . . ."). Deletion of the "essence of the novelty" limitation from the enacted version of § 112 indicates that "the limitation was not intended." *Russello*, 464 U.S. at 24.[4] Petitioner's effort to resurrect a rejected version of § 112 ¶ 6 is improper.

The 1952 enactment of § 112 ¶ 6 brought uniformity to the issues of validity and scope of all means-plus-function claim elements, not just those at the "point of novelty."

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[4] The Court has explicitly rejected the notion that some elements of a claim are more important than others, stating that "there is no legally recognizable or protected 'essential' element, 'gist' or 'heart' of the invention in a combination patent." *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 345 (1961). Every element is essential, and the standards applied to one apply to all.

Since its enactment, every court has applied the requirement that the corresponding structure must be described in the specification to all means-plus-function elements.

B. Because The Issue Was Not Preserved In The Courts Below, This Case Is Not An Appropriate Vehicle For Review Of The Federal Circuit's Interpretation Of 35 U.S.C. § 112.

In any event, this case is not the proper vehicle for deciding the issue because petitioner has waived this argument. Petitioner never contended in the courts below that means-plus-function limitations were subject to a dual standard depending upon whether or not they were at the point of novelty. In the trial court, petitioner never challenged the Federal Circuit's requirement that "corresponding structure" be clearly "described in the specification" so as to give the public notice of the scope of the claim. Before the Federal Circuit, petitioner again did not contend that § 112 ¶ 6 was subject to a dual standard of review. Even on its petition for rehearing, petitioner did not contend that there was a dual standard for interpretation of § 112 ¶ 6 depending upon whether or not the claim element was at the point of novelty.

Petitioner apparently believes that it can raise the issue now because the Federal Circuit relied on the *Braun* decision in its opinion below. Pet. at 15-16. However, the Federal Circuit's reliance on *Braun* is unrelated to either issue presented for review. Moreover, even though Federal Circuit Rule 35(a) specifies that a panel of the Federal Circuit cannot overrule a binding precedent, petitioner did not even advise the Federal Circuit in its opening brief that it was seeking to overrule the binding *Braun* decision. Indeed, petitioner first cited the *Braun* decision in its petition for *rehearing* of the panel decision, rather than timely raising it before the panel itself. *See George. E. Warren Corp. v. United States*, 341 F.3d 1348, 1351-52 (Fed. Cir. 2003). Thus, Petitioner's criticism of *Braun*, not having been raised

in either question presented in the petition and not having been properly preserved in the courts below, is not properly the subject of review on this petition.[5]

Because petitioner did not put the lower court fairly on notice as to the substance of the issue which it now attempts to present to the Court, it has failed to preserve the issue for review by the Court. *See Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Therefore, this case does not provide an appropriate vehicle for review of the Federal Circuit's jurisprudence concerning the statutory interpretation of 35 U.S.C. § 112 ¶ 6.

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[5] In any event, *Braun* presents no issue meriting plenary review by the Court because it presents no conflict of authority. It has been cited with approval in decisions by virtually every Federal Circuit judge, including the dissenter in this case. *Golight, Inc. v. Wal-Mart Stores*, 2004 U.S. App. LEXIS 775 at *17 (Fed. Cir. Jan. 20, 2004) (Prost, Schall, Archer) (citing *Braun* and the Federal Circuit's opinion in the present case with approval); *Utah Med. Products, Inc. v. Graphic Controls Corp.*, 350 F.3d 1376, 1384 (Fed. Cir. 2003) (Rader, Mayer, Michel) (quoting *Braun* duty to "clearly link" function to structure); *Intellectual Prop. Dev., Inc. v. UA-Columbia Cablevision of Westchester, Inc.*, 336 F.3d 1308, 1320 (Fed. Cir. 2003) (Schall, Dyk, Gajarsa); *Northrop Grumman Corp. v. Intel Corp.*, 325 F.3d 1346, 1352 (Fed. Cir. 2003) (Bryson, Friedman, Mayer); *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003) (Michel, Linn, Lourie); *Epcon Gas Sys. Inc. v. Bauer Compressors, Inc.*, 279 F.3d 1022, 1032 (Fed. Cir. 2002) (Linn, Clevenger, Mayer); *Generation II Orthotics v. Medical Tech., Inc.*, 263 F.3d 1356, 1367 (Fed. Cir. 2001) (Linn, Dyk, Newman); *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1377 (Fed. Cir. 2001) (Linn, Bryson, Dyk); *Medtronic, Inc. v. Advanced Cardiovascular Sys.*, 248 F.3d 1303, 1311 (Fed. Cir. 2001) (Linn, Dyk, Michel); *Unidynamics Corp. v. Automatic Products Int'l*, 157 F.3d 1311, 1319 (Fed. Cir. 1998) (Rich, Michel, Schall); *Kahn v. GMC*, 135 F.3d 1472, 1476 (Fed. Cir. 1998) (Gajarsa, Newman, Rader). None has criticized it.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOHN F. SWEENEY
HARRY C. MARCUS
MORGAN & FINNEGAN, LLP
345 Park Avenue
22nd Floor
New York, NY 10154-0053
(212) 415-8525

Of Counsel

THERESA M. GILLIS
(*Counsel of Record*)
PAUL E. TORCHIA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Respondents